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In the

Supreme Court of the United States

October Term, 1966

No. 803

LUIGI BAFICO,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the

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October Term, 1966

No. _____

LUIGI BAFICO,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 26, 1966.

OPINIONS BELOW

The memorandum opinion of the District Court (R 103-109) is unreported. The opinion of the Court of Appeals for the Ninth Circuit (R 110-113) is reported in 364 F2d 36, and a copy thereof is appended to this petition in the Appendix at pages 16-20.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 26, 1966 (R 109) and a copy thereof is appended to this petition in the Appendix at page 21. Rehearing was denied on September 2, 1966 (R 115). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Mr. Bafico was permanently injured as a result of the independent concurring negligence of the respondent, Southern Pacific Company and Dad's Root Beer Bottling Company of Portland, Oregon (Tr. 42, Def Exh 6 p 13, lines 29-30). Respondent promised to take care of Mr. Bafico if he didn't sue the railroad (Tr. 81). Mr. Bafico thereafter brought suit against Dad's Root Beer Bottling Company of Portland, Oregon (Tr. 16, 17). The case was settled prior to trial (Tr. 19) and Mr. Bafico signed the standard printed form release used by the insurance company for Dad's Root Beer Bottling Company of Portland, Oregon (Tr. 24; Def. Exh. No. 1). Respondent was not a party to the release, had no dealing regarding it and paid nothing toward it. In Mr. Bafico's suit against the Southern Pacific Company, respondent pleaded the release as its fourth defense (R 9). The release was tried as a segregated issue (R 77). The District Court ruled that respondent had the burden of

proof that petitioner Mr. Bafico intended to discharge from liability a stranger to the release signed by him (Tr. 12, 13). Thereafter the District Court excluded Mr. Bafico's oral testimony that he did not intend the release between himself and Dad's Root Beer Bottling Company of Portland, Oregon to constitute a release of the respondent (Tr. 57-59). There was no testimony showing concert of action, common design or duty, joint enterprise or other relationship that would make respondent and Dad's Root Beer Bottling Company of Portland, Oregon joint tortfeasors. However, the District Court held that the release of Dad's Root Beer Bottling Company of Portland, Oregon released respondent (R 78-A). The Court of Appeals for the Ninth Circuit affirmed (Tr. 114). The questions presented are:

1. Where is has been held under Oregon decisional law that releases must be given effect according to the intention of the parties, that parol evidence is permitted to establish that a release purporting to "extinguish all liability of whatever kind arising out of said injuries" is intended as only a partial release and, that a litigant, who was not a party to a written agreement upon which he seeks to rely, may not prevent the introduction of parol evidence to establish the intention of the parties to the agreement, may the Circuit Court of Appeals for the Ninth Circuit refuse to follow the state decisional law, whenever the question is one of general law.

2. Whether the Southern Pacific Company had sustained the burden of its proof that Mr. Bafico intended to discharge from liability a stranger to the release signed by him and in particular where the action was brought against the respondent under a federal act designed for the class to which Mr. Bafico belonged which act had no correlation with the law suit in which the release was given.

3. Whether the amount received by Mr. Bafico should constitute full satisfaction or partial satisfaction and if partial satisfaction whether a release given to Dad's Root Beer Bottling Company of Portland, Oregon should bar his right to proceed against respondent.

4. Whether a release given to one tortfeasor may by the breadth of its language bar action against another alleged tortfeasor who contributed nothing to the settlement.

5. Whether the Court of Appeals for the Ninth Circuit is warranted in extending the theory of uncommunicated mental reservations as between parties to a release by holding that any uncommunicated mental reservations between the parties to the release inures to the benefit of a third party not in privy or that any reservation, mental or otherwise, about another tortfeasor must be communicated to the released tortfeasor in order not to be waived.

6. Whether the release of one tortfeasor released the other where they were independent concurring tortfeasors rather than joint tortfeasors.

STATUTES INVOLVED

The statutory provisions of the Federal Employers' Liability Act 45 U.S.C. §§ 51-60 are applicable.

STATEMENT

The jurisdiction of the District Court was invoked under the Federal Employers' Liability Act, 45 U.S.C. §§.51-60.

Mr. Luigi Bafico, the petitioner in this case, was employed by respondent in its Brooklyn Yards, Portland, Oregon, as a section worker maintaining respondent's right of way (Tr. 50). Mr. Bafico was born in Italy (Tr. 27), attended school through the third grade (Tr. 80) and came to this country when he was 23 years old (Tr. 47). He can read and write his name in English and that is about the extent of his literacy (Tr. 80). He can read and write in Italian (Tr. 80). Mr. Bafico was 62 years old when injured (Tr. 46). He is married and at the time of trial had three children between the ages of 14 and 8 (Tr. 27). He has been totally and permanently disabled since June 11, 1962 (Tr. 42; Def Exh 6, p 13, lines 29-30).

On June 11, 1962, the Southern Pacific Company's work and safety rules provided that bridge and section gangs working away from the Brooklyn Yards were to be driven to and returned from the section of track assigned to them by a motor vehicle provided and driven by defendant (Tr. 43). In violation of this work and safety rule, petitioner was sent by his superior at the Brooklyn Yards on the morning of June 11, 1962, to a section of track and was directed to drive his own automobile in getting to the place of work assigned to him (Tr. 50, 51). Petitioner complied with the defendant's demands (Tr. 51). Respondent's negligence in sending plaintiff to work in violation of its work and safety rules combined with the negligence of Dad's Root Beer Bottling Company of Portland, Oregon, whose truck ran a red light and struck Mr. Bafico's automobile as he was leaving the Southern Pacific Company's Brooklyn Yards (Tr. 50, 51).

Immediately after this collision, Mr. Bafico was hospitalized (Tr. 52). Within two or three days after his admission to the hospital, and while yet in the hospital, Mr. Bafico was approached by the representatives of the railroad who promised to take care of him if he didn't sue the railroad (Tr. 81). Thereafter, the railroad attempted to have him sign, while he was yet in the hospital, what was represented to him as a paper to help

him (Tr. 81). The paper was prepared at the hospital by one of the railroad's representatives, but Mr. Bafico refused to sign it (Tr. 80, 81).

In the fall of 1962, an action at law was filed solely against Dad's Root Beer Bottling Company (Tr. 16, 17). Trial of this case was set for April of 1963 (Tr. 19). At that time, Mr. Bafico's railroad retirement disability payments had terminated and he and his family were on welfare (Tr. 25). The case against Dad's Root Beer Bottling Company of Portland, Oregon was settled for $16,500 on the morning of the trial (Tr. 19).

From these proceeds, Mr. Bafico paid back railroad retirement for the disability benefits paid to him, paid back public welfare (Tr. 71), purchased a used car to replace the one totalled out by the accident (R. 12), paid his doctors (Tr. 71) and paid his attorney's fees and the costs of the lawsuit (R. 12). This left Mr. Bafico for his use and the use of his famliy, $7,400 (Tr. 74).

The release was signed in petitioner's attorney's office (Tr. 58). The release does not mention the Southern Pacific Company. There was no intention on the part of Mr. Bafico at that time or any other time to release the Southern Pacific Company from their promise to Mr. Bafico (Tr. 81).

The release itself was in evidence in the hearing and was a standard printed form release used by the insur-

ance company for Dad's Root Beer Bottling Company of Portland, Oregon (Tr. 24; Def. Exh. No. 1). A copy thereof is part of the Court of Appeals opinion and is found in the Appendix at pages 17-18.

Respondent was not a party to this release, had no dealings regarding it, and paid nothing toward it (Tr. 82). Further, there was no evidence offered by respondent nor any evidence produced during the course of the trial showing that any consideration moved from the respondent to the petitioner as a result of the settlement reached, pursuant to the signing of the release herein (Tr. 82).

REASONS FOR GRANTING THE WRIT

1. In *Rudick v. Pioneer Memorial Hospital*, 296 F2d 316 (9th Cir. 1961) at page 318, the Court of Appeals for the Ninth Circuit after reviewing the Oregon decisional law on the question of releases, adopted the position that releases must be given effect according to the intention of the parties and allowed parol evidence to show that a release purporting to "extinguish all liability of whatever kind arising out of said injuries" was intended as only a partial release. *Hicklin v. Anders*, 201 Or 128, 253 P2d 897, 269 P2d 521 (1954). The Court in the Rudick case went on to further define the Oregon decisional law to the effect that a litigant who was not a party to a written agreement upon which he seeks to

rely may not prevent the introduction of parol evidence to establish the intention of the parties to the agreement. *Keadle v. Padden*, 143 Or 350, 20 P2d 403, 22 P2d 892 (1933).

The Court of Appeals for the Ninth Circuit in the case at bar disregarded the holdings of the two Oregon cases as set out in the *Rudick v. Pioneer Memorial Hospital* case and approved the holding of the District Court, which excluded Mr. Bafico's oral testimony that he did not intend the release between himself and Dad's Root Beer Bottling Company of Portland, Oregon to constitute a release of respondent (Tr. 57-59).

Since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, state decisional law must be followed by federal courts whenever a state created right is involved, whatever may be the basis of jurisdiction. This was made apparent by the Supreme Court in 1939 in *Wichita Royalty Co. v. City National Bank*, 306 U.S. 103, 107. To allow the decision in the case at bar to stand would be to establish a conflict between decisions of courts of appeal and the highest state court. The rule that federal courts are themselves free to make an independent determination of the law applicable to state created rights whenever the question was one of general law as set forth in *Swift v. Tyson*, 16 Pet. 1, (U.S. 1842), is, of course, no longer the law.

The holding of the case at bar is in conflict with

another Ninth Circuit decision *Friday v. United States*, 239 F2d 701, 704 (9th Cir. 1957). The *Friday* case is similar in principle with the *Rudick* case.

Furthermore, the instant opinion sets up a conflict in the Court of Appeals for the Ninth Circuit between the panel of that Court deciding the *Rudick* case and the panel of that Court deciding the case at bar. The existence of such an intracircuit conflict, especially where the problem in issue is an important or recurrent one within the circuit as problems of releases are, has on other occasions moved the U. S. Supreme Court to grant certiorari in order to bring about uniformity within the circuit. *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181; *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508; *Maggio v. Zeitz*, 333 U.S. 56, 59. The U. S. Supreme Court has on yet another occasion when there was such a conflict remanded the case for a hearing before all the circuit judges sitting en banc. *United States ex rel. Robinson v. Johnston*, 316 U.S. 649.

2. There is a growing body of authorities which no longer recognize that the release of one of several tortfeasors automatically releases all and under which the intention of the parties to the release is a crucial test by which to determine whether the release operates as a release of other tortfeasors not parties thereto.

The Second Circuit in two cases *Eagle Lion Films v.*

Loew's Inc., 219 F2d 196, 198 (2d Cir. 1955) and *Vines v. General Outdoor Advertising Co.*, 171 F2d 487, 492 (2d Cir. 1948) have held that the releasor's intent is the determinative factor in establishing the effect of a general release on the liability of joint tortfeasors. The Eagle Lion Films case was affirmed by an evenly divided Court in 358 U.S. 100.

The question may arise as to whether the person contending that the release discharges strangers should bear the burden of establishing that it was so intended, or the releasor should have the burden of establishing that he did not intend to release strangers. Without squarely deciding this question, the Court in *Breen v. Peck*, 28 NJ 351, 146 A2d 665, 73 ALR2d 390 (1958) ruled that, at least under the particular circumstances presented, the burden might fairly be placed on the person relying upon the common law rule. This holding is supported by the case of *McKenna v. Austin*, 134 F2d 659 (DC 1943). The District Court placed the burden on respondent in the case at bar (Tr. 12). Respondent failed in his proof since the only testimony on the subject was Mr. Bafico's offer of proof that he did not intend to discharge respondent at the time he signed the release (Tr. 81, 82).

3. In some instances the Courts, without referring to the intention of the parties as the controlling factor,

have ruled that the release of one of several tortfeasors does not release others where the release is not given for a consideration in full satisfaction of the releasor's claim for his entire injury. *Friday v. United States*, 239 F2d 701, 704 (9th Cir. 1957).

Respondent's witness, Mr. Thomas, testified that there were substantial liens against the judgment for welfare and for railroad retirement disability benefits paid to Mr. Bafico (Tr. 25, 26). Mr. Bafico also testified that he was required to pay these sums back and had left for himself, after discharging these items, his doctors' bills, replacing his car, and paying his attorney, the sum of $7,400 (Tr. 74). To consider this anything less than partial satisfaction for a married man with three young children who before he was permanently disabled, was earning the sum of approximately $5,000 per year is not to accept the economics of life. Particularly since at the time of the settlement, Mr. Bafico's railroad retirement disability benefits had terminated and he was on public welfore (Tr. 25).

Obviously, Mr. Bafico accepted the best settlement that he could work out in order to keep his family together and to provide sustenance for them. He was in no position to gamble on a jury verdict and the delays of an appeal by going to trial. *He had no reason to place any written reservations in his release to Dad's Root Beer Bottling Company since he already had the assur-*

ance of the Southern Pacific that they would take care of him (Tr. 81).

4. The Court of Appeals for the Ninth Circuit in its opinion as found on page 19 of the Appendix stated the central question presented was "* * * whether, under Oregon law and in the circumstances of this case, a release given to one tort-feasor may by the breadth of its language bar action against another tort-feasor who contributed nothing to the settlement." This Court in *Maynard v. Durham & S. R. Co.*, 365 U.S. 160, 161 held that the "'validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law.'"

If the Court of Appeals for the Ninth Circuit was bound to apply federal rather than state law to the question which they considered to be the central question in the case at bar then this Court's pronouncement in the *Maynard* case at page 163 is binding upon them. This Court held as follows:

> "We think the correct rule concerning the adequacy of consideration for a release of claims under the Act was stated in *Burns v. Northern Pac. R. Co.*, 134 F.2d 766, 770. 'In order that there may be consideration, there must be mutual concessions. A release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right.'"

There was no consideration given by respondent for the Dad's Root Beer Bottling Company release signed by Mr. Bafico. Under the holding of the *Maynard* case, the release in the case at bar did not release respondent.

5. The Court of Appeals for the Ninth Circuit in its opinion (Appendix page 20) cited the case of *Wheeler v. White Rock Bottling Co.*, 229 Or 360, 366 P2d 527 (1961). This case stands for the proposition that uncommunicated mental reservations held by one of the parties at the time of execution of a contract is no ground for reformation of the contract. The Circuit Court of Appeals has extended that case to hold that uncommunicated mental reservations as between parties to a release inure to the benefit of a third party not in privy and that any reservations, mental or otherwise, about another tortfeasor must be communicated to the released tortfeasor in order not to be waived. We do not urge the holding in the *Wheeler* case by the Circuit Court of Appeals for the Ninth Circuit as a reason for granting the writ, but we reserve the right to raise the question in the event this petition is granted.

6. We do not now urge the holding that the release of one tortfeasor does not release the other tortfeasor where they were independent concurring tortfeasors as in the case at bar. But we reserve the right to raise the question in the event the petition is granted.

7. The questions presented by this case are of substantial and recurring significance, particularly in this transitional period of the common law rule concerning releases of joint tortfeasors. Not to now reexamine this area of the law will be to chance erecting the calendar into a fortress. The important nature of these issues has been recognized by this Court as recently as *Aro Mfg. Co. v. Convertible Top Co.*, 377 U.S. 476, 501, 503. The decision below, if unreversed, will inflict a conflict and will retard the expansion of the law concerning releases of joint tortfeasors. The historic responsibility of the U.S. Supreme Court to exercise supervisory power over lower federal courts make this case a peculiarly appropriate one for the exercies of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIGI BAFICO,
Appellant,
vs.
SOUTHERN PACIFIC COMPANY,
Appellee.

No. 20,006

[July 26, 1966]

Appeal from the United States District Court
for the District of Oregon

Before: J. WARREN MADDEN, Judge, Court of Claims, and HAMLEY and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

This action arises under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60. Bafico, plaintiff below and appellant here, was employed by appellee in its Brooklyn Yards, Portland, Oregon, as a section worker maintaining appellee's right of way. Appellee usually dispatched section gangs to the section of track assigned to them in a vehicle provided by appellee and driven by one of its employees. On June 11, 1962, in alleged violation of the "work and safety rules" requiring this practice, Bafico's superior directed him to drive to his assigned section of track in his own vehicle. As Bafico was leaving Brooklyn Yards, a truck owned by Dad's Root Beer Bottling Company of Portland proceeded through

a stop light and struck his automobile, demolishing it and causing the injuries which resulted in his total and permanent disability.

Bafico first brought suit against Dad's Root Beer in an Oregon state court. That action was settled for $16,500 on the morning set for trial. In return for the settlement payment, Bafico executed a "standard form" release, in the office of his own attorney and in the absence of the attorney for Dad's Root Beer, which reads in pertinent part as follows:

"FULL AND FINAL RELEASE OF ALL CLAIMS

"KNOW ALL MEN BY THESE PRESENTS, that the Undersigned do(es) hereby acknowledge receipt of a draft for *Sixteen Thousand Five Hundred and no/100ths* Dollars *($16,500.00)* which draft is accepted in full compromise settlement and satisfaction of, and as sole consideration for the final release and discharge of, all actions, claims and demands whatsoever, that now exist, or may hereafter accrue, against *DAD'S ROOT BEER BOTTLING COMPANY OF PORTLAND, OREGON* and any other person, corporation, association or partnership charged with responsibility for injuries to the person and property of the Undersigned, and the consequences flowing therefrom, as the result of an accident, casualty or event which occurred on or about the *11th* day of *June*, 1962 at or near *S. E. Harold Street and McLoughlin Boulevard* and for which the Undersigned claims the said persons or parties are legally liable in damages; which legal liability and damages are disputed and denied, and;

"The Undersigned Warrants, that no promise or inducement has been offered except as herein set forth; that this Release is executed without reliance upon any statement or representation by the person or parties released, or their representatives, or physicians, concerning the nature and extent of the injuries and/or damages and/or legal liability there-

for; that the Undersigned is of legal age, legally competent to execute this Release and accepts full responsibility therefor, and;

"The Undersigned Agrees, as a further consideration and inducement for this compromise settlement, that it is a full and final release of all claims and shall apply to all known and unknown and anticipated and unanticipated injuries and damages resulting from said accident, casualty or event, as well as to those now known or disclosed."

The italicized matter in the foregoing quotation was added in blank spaces in the printed form; the release is signed by Luigi and Victoria Bafico, and by their attorney in his capacity as a notary public.

Approximately a year later Bafico brought this action, seeking recovery on the ground of appellee's alleged negligence in sending him to his work station in his own automobile in breach of its own "work and safety rules." He claimed that as an ultimate result of that negligence he lost $9,472 in wages, expended $344 for medicine and medical attention, and sustained general damages of $50,000, and sought judgment in the total sum of $59,816 and costs. After appellee raised the release as a defense, the district court granted Bafico's motion for a separate trial on the segregated issue of the legal effect of that release.

That trial resulted in a judgment for appellee, based on findings and conclusions that (1) appellee had sustained its burden of proof that Bafico intended by the release to discharge it from liability; (2) the settlement received by Bafico from Dad's Root Beer constituted full satisfaction for all injuries received in the accident; (3) appellee, if negligent at all, was a joint tort-feasor rather than an independent concurring or aggravating tortfeasor, and so was discharged from liability by the

release executed to the other tort-feasor; and (4) the language of the release was unambiguous and the intention of the parties to the agreement, reflected in the preceding findings, was clear.

Bafico assigns all of these findings, and the trial court's refusal to permit parol proof of Bafico's "true" but uncommunicated intent when signing the release, as error.

The central question presented is whether, under Oregon law and in the circumstances of this case, a release given to one tort-feasor may by the breadth of its language bar action against another alleged tort-feasor who contributed nothing to the settlement. A subsidiary problem is whether the trial court's refusal to take evidence on the intent of a party to the release constitutes reversible error. Appellant seems to rely principally upon our decision in *Rudick v. Pioneer Memorial Hospital*, 9 Cir., 1961, 296 F.2d 316, in urging that the first question be answered no and the second yes.

In *Rudick* the plaintiff has been injured in an automobile accident. She alleged that she was subsequently negligently treated by the defending hospital and doctors. They urged that recovery against them was barred by the terms of a release signed by the plaintiff, which provided that in return for the settlement sum paid by the offending driver, he "and all other persons, firms and corporations in any way interested or concerned" should be released from liability arising out of "an automobile accident" which occurred "On or about the 25th day of May, 1957, in the vicinity of Mitchell, Oregon." She had been advised to sign the release by her brother, a legal layman so far as the opinion shows, who had carried on negotiations with the driver's insurer and discovered that the applicable policy limit was less than 20 percent above the sum for which plaintiff finally settled. On appeal, after a full consideration of the relevant Oregon decisions, we said that "the question is the clarity of the document to this appellant, knowing

what she knew as to who the insured was and what the policy limits were," and held that "to this *layman*" the document's "apparent confinement of the release to a 'certain accident, casualty or event which occurred on or about the twenty-fifth day of May, 1957, at or near Mitchell, Oregon' might very well . . . have excluded a release of acts of negligence subsequently committed in a hospital in Prineville." 296 F.2d at 320.

In the present case the situation is obviously different. Here the negligence of Dad's Root Beer and the negligence, if any, of appellee materialized in a single accident, not in two occurrences of negligence separate in time and space. Here the release ran to Dad's Root Beer "*and any other* person, *corporation*, association or partnership *charged with responsibility for injuries to the person and property of the Undersigned*" (emphasis added), not merely to "all other persons, firms and corporations in any way interested or concerned." Here appellant was represented at all times, including the negotiation for settlement and signing of the release, by his own attorney, not by a layman. We think that in these circumstances, the trial court could properly infer that appellant knew what he was doing when he signed the release and could properly hold him bound by the literal, precise, unambiguous terms of the contract he signed. It follows that no investigation into his uncommunicated intent at the time of signing was required, for "the law in this jurisdiction [Oregon] does not permit contracts to be reformed merely because of uncommunicated mental reservations held by one of the parties at the time of execution." *Wheeler v. White Rock Bottling Co.*, 1961, 229 Ore. 360, 366 P.2d 527, 529.

In view of our disposition of this issue, consideration of the other questions raised becomes unnecessary.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIGI BAFICO, *Appellant*, vs. SOUTHERN PACIFIC COMPANY, *Appellee*	No. 20,006

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 26, 1966.

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SOUTHERN PACIFIC COMPANY,
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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 803

LUIGI BAFICO,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioner respectfully requests that this Court grant rehearing of its order dated January 16, 1967, which denied certiorari, and that the Court now grant certiorari.

The petition for certiorari previously filed herein presented the question of whether the release of one tortfeasor released the other where they were independent concurring tortfeasors rather than joint tortfeasors.

The Ninth Circuit's opinion adopted the District Court's holding that respondent, if negligent at all, was a joint tortfeasor rather than an independent concurring or aggravating tortfeasor, and so was discharged from liability by the release executed to the other tortfeasor.

On July 26, 1966, the same date in which the United States Court of Appeals for the Ninth Circuit rendered a decision in this case, the United States Court of Appeals for the Fifth Circuit rendered a decision in *Reed v. Rheem Mfg. Co.*, 364 F2d 810. This case came to your petitioner's attention January 9, 1967. A copy of the opinion is appended hereto.

In both cases the consideration for the release involved was claimed to be inadequate. The release in each instant was given in "full settlement." Both releases recited that the payment of the amount of money involved did not admit liability. There was no express reservation of rights against anyone else in either release. There was no proof whatever that respondents were joint tortfeasors in either case.

It will be seen therefore that the case is in all material respects comparable to the present case. It reaches, however, an exactly opposite result.

Since there now exists a clear and express conflict of decisions among the circuits on an important question, it is appropriate that the question be reviewed by the Court.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

THOMAS H. RYAN

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOROTHY REED,
Appellant,
vs.
RHEEM MANUFACTURING COMPANY and Employers Mutual Liability Insurance Company of Wisconsin,
Appellees.
No. 22463

(July 26, 1966)

Appeal from the United States District Court
for the Eastern District of Louisiana

Before: RIVES and THORNBERRY
Circuit Judges, and GARZA, District Judge.

RIVES, Circuit Judge:

Dorothy Reed was employed as a domestic servant in the home of Ivan M. Foley in New Orleans. Foley had installed a gas hot water heater manufactured and distributed by Rheem Manufacturing Company (hereafter Rheem). When Dorothy Reed attempted to light the hot water heater an explosion occurred and a back lash of flame severely and permanently injured her vision, face and arms. So Dorothy Reed alleged in her complaint against Rheem and its liability insurer. She predicated her complaint upon negligence and implied

warranty, invoking the doctrine of *res ipsa loquitur*, and prayed for the recovery of damages in the amount of $30,000.00.

Rheem and its insurer moved to dismiss the complaint on the ground that Dorothy Reed had previously released any and all claims which she may have had as a result of the accident, and attached to their motion a copy of the release. The consideration for the release was $1,250.00 paid by Foley and his insurer and acknowledged by Dorothy Reed to be "in full settlement of any and all damages to the undersigned * * * arising from or out of any and all matters aforementioned." The release also recited that Foley and his insurer in paying said sum of money did not admit any liability.

Treating the motion to dismiss as a motion for summary judgment,[1] the district court, without disclosing its reasons, granted that motion.

On appeal, Dorothy Reed's counsel takes the same position which he had asserted in brief before the district court, viz:

> "It is the position of the plaintiff that on the basis of the pleadings and affidavits submitted there is not a scintilla of evidence that Ivan F. Foley and/or General Accident F & L Assurance Corporation, Ltd., *and* the defendants at the bar are joint tort-feasors, and accordingly the Court can not say, as a matter of law, that there is no material question

1. As permitted by Rule 12 (b) (6), Fed.R.Civ.P.

of fact to be presented to the jury, as required under the strict dictates of Rule 56, F.R.C.P."

We sustain that position and reverse. Article 2203 reads as follows:

"Art. 2203. The remission or conventional discharge in favor of one of the codebtors *in solido*, discharges all the others, unless the creditor has expressly reserved his right against the latter.

"In the latter case, he can not claim the debt without making a deduction of the part of him to whom he has made the remission."

Applying the underlying principle of that article that there is but one debt and hence there can be but one satisfaction of it, the Louisiana courts have consistently held that a release of one joint tort-feasor with no express reservation of rights discharges all joint tort-feasors.[2]

(1) In Louisiana, however, it is also settled that the release of one of several *alleged* joint tort-feasors who is not *in fact* at fault does not release the others, because there can be no joint liability between them.[3]

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2. Reid v. Lowden, 1939, 192 La. 811, 189 So. 286; Guarisco v. Pennsylvania Casualty Co., 1945, 209 La. 435, 24 So.2d 678; Evans v. Walker, 1959, La. App., 111 So.2d 885; Reiley v. Atlas Construction Company, 1962, La.App., 146 So.2d 211; Harvey v. Travelers Insurance Co., 1964, La.App., 163 So.2d 915.

3. Guarisco v. Pennsylvania Casualty Co., supra n. 2, at 24 So.2d 680; see also Evans v. Walker, supra n. 2, 111 So.2d at 890; Harvey v. Travelers Insurance Co., supra n. 2, 146 So.2d at 922. See also Annotation 73 A.L.R.2d 417, 418.

(2, 3) Apparently the burden of proof in a trial on the merits rests upon an alleged tort-feasor who claims the benefit of a release granted to another to establish that the other "was negligent and thus that he was a joint tort-feasor."[4] In any event, "the burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether he or his opponent would at trial have the burden of proof on the issue concerned." 6 Moore F.P.2d Ed., p. 2342.[5] Before rendering summary judgment, the Court must be satisfied not only that there is no issue as to any material fact but also that the moving party is entitled to a judgment as a matter of law.[6]

(4) According to Dorothy Reed's affidavit filed in opposition to the motion, the $1,250.00 consideration she received for the release was in no way adequate compensation for the injuries she received. Her counsel argued to the district court in brief that the inadequacy of that consideration should be compared with the allegation in the pleadings, to be taken as true for purposes of the motion, that as a result of her injuries she is entitled to recover $30,000.00 from Rheem and its insurer. As has been stated, the release itself contained an express denial of any admission of liability on the part of

4. Harvey v. Travelers Insurance Co., supra n. 2, 146 So.2d at 922; see also Evans v. Walker, supra n. 2, 111 So.2d at 890.
5. See also Surkin v. Charteris, 5 Cir. 1952, 197 F.2d 77, 79.
6. Rule 56 (c), Fed.R.Civ.P.; Palmer v. Chamberlin, 5 Cir. 1951, 191 F.2d 532, 540, 27 A.L.R.2d 416.

Foley and his insurer. All of these circumstances are consistent with Dorothy Reed's position that there is no conclusive proof, indeed no proof whatever, that Foley is a joint tort-feasor with Rheem.

Clearly, the burden rested on Rheem and its insurer, as the parties moving for summary judgment, to prove that there is no genuine issue of fact but that Foley was at fault in injuring Dorothy Reed. Otherwise, there can be no joint liability between Foley and Rheem. Rheem and its insurer having failed to meet that burden, the judgment is reversed and the cause remanded.

Reversed and remanded.